

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

CIVIL WRIT PETITION NO. 4544 OF 2015

Mr. Vijay Jayram Parab. ... Petitioner.

V/s.

The Chairman, Mumbai Port Trust & Ors. ... Respondents.

***with
CIVIL WRIT PETITION NO. 4471 OF 2015***

Mr. Pandurang Laxman Kumthekar. ... Petitioner.

V/s.

The Chairman, Mumbai Port Trust & Ors. ... Respondents.

Mr. Jaiprakash Sawant for the Petitioners in both Petitions.
Dr. Abhinav Chandrachud a/w. Ms. Kavita Anchan – Poojari i/b.
M.V. Kini & Co. for Respondent 1 in both Petitions.

CORAM : N.M. JAMDAR, J.

DATE : 20 OCTOBER, 2015.

ORAL JUDGMENT :-

Rule. Returnable forthwith. Respondents waive service. Taken up for final disposal by consent.

2. Both these Petitions arise from the Award passed by the Central Government Industrial Tribunal – 2 dated 17 June 2013. The Tribunal held that the Petitioners were wrongfully retired from the services at the age of 58 when they ought to have continued in service till the age of 60.

3. The Government of India, Ministry of Labour and Employment made a reference under Section 10(1) and 2(a) of the Industrial Disputes Act, referring the dispute for adjudication to the Central Government Industrial Tribunal, Mumbai. The term of reference was whether the action of Respondent – Trust in retiring the Petitioners at the age of 58 was just and proper. The Petitioner in Writ Petition No. 4544 of 2015 was working as a Cargo Supervisor and Petitioner in Writ Petition No. 4471 of 2015 was working as Tally and Sorting Clerk. The Tribunal, after considering the rival contentions and the material produced on record, came to the conclusion that the retirement of the Petitioners at the age of 58 was not just and proper and it should have been at the age of 60. The Tribunal thereafter disposed of the reference by giving a declaration to that effect and directing the Respondent – Trust to pay compensation to the Petitioners at the rate of 20% per month of his last pay for the period of 2 years i.e. 24 months. The Tribunal did not grant the full back wages for the period of 2 years i.e. after the age of 58 years before completion of 60 years, on the ground that the Petitioners had not

specifically pleaded that they were not gainfully employed elsewhere during the relevant period.

4. Mr. J.P. Sawant, learned Counsel for the Petitioners relied upon the decision of the Apex Court in the case of *Raghubir Singh v/s. General Manager, Haryana Roadways, Hissar*¹ to contend that it is upon the employer, if he wants to deny the back wages or contest the entitlement of an employee to get consequential benefits after declaration that the termination was bad in law, to prove that during the intervening period the employee was gainfully employed and was getting emoluments. Dr. Abhinav Chandrachud, the learned Counsel for the Respondents on the other hand submitted that before such burden shifts on the employer, the employee needs to specifically plead that he was unemployed during the relevant period. He submitted that this issue was not in consideration before the Apex Court in the case of *Raghubir Singh* (supra). He relied on the decision of the Apex Court in the case of *Deepali Gundu Surwase v/s. Kranti Junior Adhyapak Mahavidyalaya (D. Ed) and Ors.*²

5. I have perused the decision in the case of *Raghubir Singh* (supra) and the decision in the case of *Deepali Surwase* (supra). In the case of *Deepali Surwase* (supra), the Apex Court was considering case of a teacher in a primary school. The

¹ (2014) III CLR 522

² (2014) II CLR 813 S.C.

Petitioner therein was terminated from service, she approached the School Tribunal which allowed the Appeal and set aside her termination with full back wages. The Management challenged the order of the School Tribunal before the High Court and the learned Single Judge allowed the Petition and set aside the order of the Tribunal directing termination as well as payment of back wages. Before the Apex Court it was contended by the Management that the High Court did not commit any error by setting aside the direction given by the Tribunal for payment of back wages to the Appellant therein because she had not pleaded nor there was any evidence that during the relevant period she was not employed elsewhere. A specific contention as regards lack of pleading was raised before the Apex Court in the case of *Deepali Surwase*. The Apex Court observed in para 22 as under :-

“22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow

from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.”

This paragraph is reproduced in the decision of *Raghubir Singh* and relied upon by Mr. Sawant. Perusal of the above quoted passage indicates that though the Apex Court has observed that if the employer wants to deny back wages to employee or to contest his entitlement, it is for him to specifically plead that the employee was working elsewhere, there is no reference to the initial responsibility of the employee to plead in the statement of claim or Appeal as the case may be. The Apex Court in this paragraph has only reiterated that to deny back wages to an employee, which is generally should be a regular rule, heavy burden is cast on the employer.

6. The necessity of initial pleadings is specifically made clear by the Apex Court in the decision of *Deepali Surwase* while laying down the principles from review of various decisions. In paragraph 38 of the decision, the Apex Court has laid seven principles, of which the principle contained in paragraph 38.3 is relevant :-

“38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.” (emphasis supplied).

7. The Apex Court in *Deepali Surwase* therefore reiterated the settled law that burden of proof of existence of a particular fact is on the person who makes the assertion about its existence and it is easier to prove positive fact than the negative fact, but at

the same time it is also emphasised that an employee whose services are terminated and who is desirous of getting back wages is required to plead or at least make a statement regarding his employment. These statements are made on oath and if the employee is actually working elsewhere and is gainfully employed, he may not make such statement on oath. But when he does so, heavy burden is cast upon the employer to disprove the same. The decision in the case of *Raghubir Singh* has not dealt with the aspect of pleadings, and therefore, it will be of no assistance to the Petitioners.

8. In the present case, admittedly there is no statement made by the Petitioners that, after their services were dispensed with, they were not gainfully employed elsewhere. The view taken by the Tribunal in law therefore cannot be faulted with.

9. Normally the matter would rest at that, drawing a presumption that the statement was not made because that was the truth. But one submission made by Mr. Sawant cannot be brushed aside. He submitted that it is not possible that at the age between 58 to 60, the Petitioner would be gainfully employed and the lack of pleadings is a mere omission. This is not a case of reinstatement of an employee at the prime of their working career. It is of the employees who have generally expressed the age of superannuation. It is true as contended by Dr. Chandrachud that an inference cannot straight away be drawn that the Petitioners

could not have been gainfully employed looking at their age. But I am not inclined to foreclose their case for back wages forever in the facts of this case. Therefore, I am of the opinion that the aspect of back wages needs to be remanded to the Tribunal for reconsideration, giving an opportunity to both the parties.

10. It will be open to the Petitioners to file an affidavit regarding status of gainful employment during the relevant period i.e. the period of age of 58 and 60 years. Mr. Sawant states that such affidavit with copy to the Respondents shall be filed within period of four weeks. The Respondents will be entitled to file their counter and the Tribunal will be entitled to permit the parties to lead evidence in this regard if it feels necessary, and decide the claim towards back wages on its own merits.

11. The Writ Petitions are accordingly disposed off by the following directions :-

(1) Clause 2 of the impugned Award is quashed and set aside and the Reference is restored to file of the Tribunal to consider the aspect of back wages.

(2) The parties will be at liberty to file their pleadings as indicated above and it is open to the Tribunal to permit the parties to lead evidence

on the issue of back wages, if it feels necessary.

(3) All contentions on merits of the claim towards back wages, are kept open.

12. Writ Petitions are disposed off as above. No order as to costs.

(N.M. JAMDAR, J.)